

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 290

LOUIS PINO

491

Appellant,

v.

UNITED STATES OF AMERICA

Appellee.

Appeal From Judgment of the United States District
Court for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 5 1966

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STATEMENT OF QUESTIONS PRESENTED

1. Whether the Trial Court had jurisdiction to try appellant, Louis Pino, upon an indictment charging "Charles Pino, aided and abetted by Louis Pino," with having committed an assault in violation of 22 D. C. Code §505(a)?

2. Whether the indictment, which merely repeated the generic words of the statute, contained a plain, concise and definite statement of the essential facts, as required by Rule 7(c) of the Federal Rules of Criminal Procedure?

3. Whether the Trial Court should have granted appellant's motion for acquittal because inconsistent evidence presented by the Government was insufficient to establish his guilt beyond a reasonable doubt?

4. Whether misstatements of fact by the prosecutor in his rebuttal argument deprived appellant of a fair trial?

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,980

LOUIS PINO

Appellant,

v.

UNITED STATES OF AMERICA

Appellee.

Appeal from Judgment of the United States District
Court for the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant, Louis Pino, was convicted in the United States District Court for the District of Columbia, Hon. Luther W. Youngdahl, Judge, of an assault on a member of the Metropolitan Police Department in violation of 22 D. C. Code, §505(a). On January 26, 1966, he was sentenced to serve one (1) to three (3) years. The Trial Court granted appellant leave to appeal in forma pauperis. The jurisdiction of this Court is founded on 28 U. S. C. §1291.

STATEMENT OF THE CASE

About 1:30 A.M. on Saturday, September 11, 1965, a fight occurred on the dance floor at Guy's Tavern, in the 500 block of 8th Street in Southeast Washington (TR 27, 113). Appellant^{1/} and another man, Lawrence Schneider, were asked to leave the restaurant by Officer Riker, a uniformed officer, and Officer While, a plain clothes officer, respectively, of the Metropolitan Police Department (TR 27, 31, 33, 95, 113, 148). Officer Riker and appellant were followed outside by many other persons. A disturbance broke out in which Officer Riker's jaw was broken (TR 29, 71-72, 97, 108, 135, 140, 168, 172, 185, 208). After additional police officers were called to the scene, a number of arrests for disorderly conduct were made (TR 36, 192, 205, Ex. 1).

Appellant ran from the scene after the fighting outside of the restaurant broke out (TR 150). He was seriously injured in an automobile accident several hours later and taken to D. C. General Hospital, where he was arrested at about 6:30 A.M. by Officer Riker (TR 37-38, 76-77, 145-46, 151-52, 181-82).

Appellant's appearance before the Court of General Sessions on Officer Riker's complaint against him, originally scheduled for September 14, 1965, was postponed because of his confinement in the hospital (App. A1). Preliminary bond in the amount of \$2,000 was placed for him by bondsman N. M. Robinson on September 13, 1965. On October 1, 1965, after his discharge from D. C.

^{1/}

"Appellant", as used herein, refers only to appellant Louis Pino. Appellant Charles Pino is referred to by name.

General Hospital, appellant appeared before the Court of General Sessions with John Everett Light, an agent for bondsman Robinson, at which time the original bond was cancelled and replaced by a new bond in the amount of \$1,000 (App. A2).^{2/}

In the meantime, on September 27, 1965, an indictment was filed against appellant and his brother, Charles Pino, charging them with an "Assault on Member of Police Force" in violation of 22 D. C. Code §505(a). The indictment contained the following two counts:

FIRST COUNT:

On or about September 11, 1965, within the District of Columbia, Charles Pino, aided and abetted by Louis Pino, without justifiable and excusable cause, did assault, resist, oppose, impede, intimidate and interfere with Charles R. Riker, knowing him to be a member of the Metropolitan Police Department operating in the District of Columbia, while the said Charles R. Riker was engaged in the performance of his official duties.

SECOND COUNT:

On or about September 11, 1965, within the District of Columbia, Louis Pino, aided and abetted by Charles Pino, without justifiable and excusable cause, did assault, resist, oppose, impede, intimidate and interfere with Charles R. Riker, knowing him to be a member of the Metropolitan Police Department operating in the District of Columbia, while the said Charles R. Riker was engaged in the performance of his official duties.

Appellant retained counsel and at his arraignment on October 8, 1965, pleaded not guilty to the indictment.

^{2/} The appendix to this brief contains photocopies of official records of the Court of General Sessions. Appellant requests that this Court take judicial notice of these records, which are not in the record of the District Court proceeding.

The case was tried before Judge Youngdahl on December 14, 15, 16 and 17, 1965. Following the prosecutor's opening statement, the Court dismissed the second count of the indictment on the ground that both counts are "the same thing" (TR 21). On December 17, the jury returned a verdict of "guilty" against both defendants on the first count, after having failed to agree and having returned for clarification of instructions the preceding afternoon (TR 293-95).

There is no dispute between the parties as to the fact that a fight started on the dance floor and that Officer Riker broke it up and then took appellant outside of the restaurant. There is a sharp conflict in the testimony, however, as to what took place thereafter. Officer Riker testified appellant jostled him on the way out and that he arrested appellant for disorderly conduct when they got outside (TR 27-28); that while holding appellant against the wall he was taken hold of from behind by another man and when he turned around, this other man, whom he identified as appellant Charles Pino, hit him on the jaw (TR 29). Officer Riker testified further that appellant then hit him on the mouth and ran away and that he chased after the appellant, but lost him (TR 29). Officer Riker's testimony that appellant struck him was supported by Officer While (TR 115) and contradicted by the other two Government witnesses (TR 97, 107-08) as well as by both appellants and their witnesses, David Green, Nelson Pumphrey and David Thompson (TR 136, 151, 167-68, 186-87, 207-08). One Government

witness, Lawrence Schneider, testified that he was taken outside by Officer While and that when they got outside, Officer Riker was with a man Schneider didn't know, that fighting was going on all around Officer Riker who was getting hit, that appellant was in the crowd and that he didn't see appellant strike Officer Riker (TR 95-97). Another Government witness, Joseph Spivacke, a member of the police reserve who has three roommates who are police officers, testified that he was right behind Officer Riker when he went outside, that he did not see anyone hit him, that he saw only one man swing at him and that this man was not appellant (TR 107-08, 111).

In addition to contradicting Officer Riker's testimony about the events which took place outside of the restaurant, appellant introduced evidence challenging Officer Riker's identification of appellant as the man who had struck him. The record leaves no doubt that a general melee took place outside of the restaurant, with many fights going on which Officers Riker and While were trying to break up. Officer Riker testified that he fainted after unsuccessfully chasing Louis and that he later woke up at the precinct station (TR 73-74), that after having his jaw treated at D. C. General Hospital he returned to the precinct where he heard that appellant had been injured in an automobile accident (TR 37), and that Officer While and he then went to D. C. General Hospital where they arrested both appellant and Charles Pino, appellant being on a table in the emergency room where glass was

being removed from his face (TR 37, 76-77).

Officer Riker stated that he had no difficulty recognizing appellant in the hospital, although admitted his face was cut very badly, bleeding very badly and mangled (TR 37, 76-77). He testified that he had never seen appellant before that night (TR 32, 224) and that his jaw had been broken by the first blow which he had received while his back was turned on appellant (TR 29-31, 60).

Appellant's wife testified she arrived at the hospital about 6:30 A.M. and that his face was so swollen and bandaged that she was unable to recognize him at first (TR 144). Appellant's brother also testified that he could not recognize him at the hospital (TR 181-82). Bondsman Light testified that when he appeared with appellant at the Court of General Sessions, Officer Riker walked up to him and asked:

"Which one is Pino?" (TR 128-29)

His testimony was corroborated by appellant (TR 153), but denied by Officer Riker (TR 223).

Officer Riker testified that he saw appellant and Light in the Court of General Sessions on September 14, 1965 (TR 222-23). The records of the Court of General Sessions show that appellant was in the hospital at that time and that he did not appear at the Court of General Sessions until October 1, 1965 (App. A1, A2, B, C, D).

STATUTES AND RULES INVOLVED

Article V of the amendments to the Constitution of the United States provides in pertinent part:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *."

Title 22, D. C. Code, §105 provides in pertinent part:

"In prosecutions for any criminal offense all persons advising, inciting, or conspiring at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, * * *."

Title 22, D. C. Code, §505(a) provides in pertinent part:

"Whoever without justifiable and excusable cause, assaults, resists, opposes, impedes, intimidates, or interferes with any officer or member of any police force operating in the District of Columbia, * * * while engaged in or on account of the performance of his official duties, shall be fined not more than \$5,000 or imprisoned not more than five years or both."

Rule 7(c), Federal Rules of Criminal Procedure, provides in pertinent part:

"Nature and Contents. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

Rule 52(b), Federal Rules of Criminal Procedure, provides:

"Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

STATEMENT OF POINTS

1. The indictment did not charge appellant with the alleged offense for which he was tried and the Trial Court lacked jurisdiction to convict him.

2. The indictment did not state the essential facts constituting the alleged offense and the Trial Court erred in not dismissing it.

3. The evidence did not prove appellant's guilt and the Trial Court erred in denying his motions for acquittal.

4. Prejudicial misstatements of fact by the prosecutor deprived appellant of a fair trial.

SUMMARY OF ARGUMENT

1. 22 D. C. Code §105 requires that in prosecutions for any criminal offense all persons aiding or abetting the principal offender "shall be charged as principals and not as accessories." Appellant, Louis Pino, was tried upon an indictment charging "Charles Pino, aided and abetted by Louis Pino" with an assault on a police officer. This indictment did not charge appellant with any offense and, if it did, it failed to charge him as a principal as required by 22 D. C. Code §105. The Trial Court lacked jurisdiction to try and convict him.

2. The indictment merely repeated the generic words of 22 D. C. Code §505(a) in charging an assault on a police officer. It set forth no information as to the manner in which the alleged assault was committed or as to how it was aided and abetted by appellant. The indictment failed to comply with Rule 7(c) of the Federal Rules of Criminal Procedure and the Trial Court erred in not dismissing it.

3. Officer Riker of the Metropolitan Police Department arrested appellant, whom he had never seen before, for disorderly conduct after a fight on a restaurant dance floor. A general disturbance followed outside of the restaurant resulting in a number of fights and several arrests. Officer Riker's jaw was broken in the disturbance. There were numerous discrepancies between the testimony of the Government's civilian and police witnesses, between the testimony of the latter, and between their testimony and the reports which they submitted immediately after the disturbance. The evidence casts serious doubt on Officer Riker's identification of appellant as the second man to strike him. The Government failed to prove appellant's guilt beyond a reasonable doubt and the Trial Court erred in denying his motions for acquittal.

4. In his rebuttal argument the prosecutor misled the jury on the crucial issue of Officer Riker's identification of appellant by inaccurately stating that Officer Riker had known him previously, by deprecating the severity of facial injuries

suffered by appellant in an automobile accident after the disturbance at the restaurant by erroneously stating that appellant was in the Court of General Sessions while he was still in the hospital. The prosecutor also implied to the jury that appellant had a criminal record although there was no evidence on this subject. These misleading rebuttal comments were highly prejudicial to appellant and deprived him of a fair trial.

ARGUMENT

I. The Trial Court Lacked Jurisdiction to Try and Convict Appellant.

With respect to Point 1, appellant desires the Court to read Count 1 of the indictment and pages 21 through 23 of the Reporter's transcript.

The indictment returned by the Grand Jury in this case contained two counts. The first count charged "Charles Pino, aided and abetted by Louis Pino," with having assaulted a police officer in violation of 22 D. C. Code §505(a). The second count charged "Louis Pino, aided and abetted by Charles Pino" with the same offense. The latter count was dismissed at the opening of the trial, leaving only Count 1 at issue. Count 1 stated:

"On or about September 11, 1965, within the District of Columbia, Charles Pino, aided and abetted by Louis Pino, without justifiable and excusable cause, did assault, resist, oppose, impede, intimidate and interfere with Charles R. Riker, knowing him to be a member of the Metropolitan

Police Department operating in the District of Columbia, while the said Charles R. Riker was engaged in the performance of his official duties."

It is submitted that the above language charges only Charles Pino with assaulting Officer Riker. The language in the count stating that he was aided and abetted by Louis Pino merely describes the method by which Charles Pino is alleged to have carried out such assault. It does not constitute a charge against appellant.

The Government's case against appellant is based upon 22 D. C. Code §105. This section, however, specifically requires that "in prosecutions for any criminal offense all persons * * * aiding or abetting the principal offender, shall be charged as principals and not as accessories * * *." This requirement was apparently recognized by the Court below, when it stated:

"They both should have been charged as principals." (TR 21-23)

Despite its conclusion that appellant should have been charged as a principal, the Court permitted him to be tried upon a count which, if it charged him with anything, charged him only with being an accessory. In United States ex rel Miller v. Walsh, 90 F. Supp. 332 (N.D. Ill.-1949), aff'd 182 F.2d 264, the Court denied a writ of habeas corpus to a prisoner being held for extradition to Michigan on a charge of having committed an assault in that State even though he was not in Michigan on the day of the alleged offense. In so holding, the Court pointed out that under

Michigan law , "an accessory to a crime can only be charged as a principal." (90 F. Supp. at 338). Similarly, under D. C. Code §105, an aider and abettor can be charged only as a principal.

The constitutional requirement that "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury,"^{3/} is jurisdictional and no court has authority to try a defendant without compliance with such requirement. Ex Parte Bain, 121 U. S. 1, 30 L. Ed. 849, 7 S. Ct. 781 (1886). A person may not be punished for a crime without a formal and sufficient accusation even if he voluntarily submits to the jurisdiction of the court. Jurisdiction cannot be waived. United States v. Choate, 276 F.2d 724, 728 (CA 5-1960). In Crosby v. United States, 119 U. S. App. D. C. 244, 339 F.2d 743 (1964), this Court, in overruling the Government's contention that an appellant's failure to object to trial upon a charge not contained in the indictment corrected the defect, stated:

"The Government relies primarily on appellant's failure to object to the dangerous-weapon charge; and without doubt this contributed substantially to the District Court's action. The Government asserts, in effect, that appellant has waived his right to be charged by a grand jury for the precise offense of which he was convicted. We cannot agree. The scope of the indictment goes to the existence of the trial court's subject-matter jurisdiction.
* * * To hold otherwise would in effect

^{3/} Amendments to the Constitution of the United States, Article V.

be to allow judicial amendment of the grand jury's indictment; this cannot be accomplished even with a defendant's consent. The Supreme Court has ruled that the Fifth Amendment's guarantee may not be so undermined. Stirone v. United States, supra; Ex Parte Bain, supra. Accordingly, we reverse appellant's conviction."

In Ex Parte Bain, where the original indictment had been amended by the Trial Court, the Supreme Court held (121 U. S. at 13):

"It is of no avail, under such circumstances, to say that the court still has jurisdiction of the person and of the crime; for, although it has possession of the person, and would have jurisdiction of the crime, if it were properly presented by indictment, the jurisdiction of the offense is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment. If there is nothing before the court which the prisoner, in the language of the Constitution, can be 'held to answer' he is then entitled to be discharged so far as the offense originally presented to the court by the indictment is concerned. The power of the court to proceed to try the prisoner is as much arrested as if the indictment had been dismissed or a nolle prosequi had been entered. There was nothing before the court on which it could hear evidence or pronounce sentence."

In Stirone v. United States, 361 U. S. 212, 216, 4 L. Ed. 2d 252, 80 S. Ct. 270 (1960), the Supreme Court discussed the Bain case and stated:

"If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made

it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says no person shall be held to answer, may be frittered away until its value is almost destroyed.' 121 U. S. 1, 10.

The Court went on to hold in Bain:

'that after the indictment was changed it was no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney * * *.'"

It is submitted that the count of the indictment upon which appellant was tried did not charge him with having committed a crime and that the Trial Court lacked jurisdiction to hear evidence against him and to convict him.

II. The Trial Court Erred in Not Dismissing the Indictment because of its Failure to State the Essential Facts Constituting the Alleged Offense.

With respect to Point 2, appellant desires the Court to read Count 1 of the indictment. Rule 7(c) of the Federal Rules of Criminal Procedure requires an indictment to be "a plain, concise and definite written statement of the essential facts constituting the offense charged." In this case the indictment merely repeated the generic words of the statute and identified

the alleged victim, but it failed to set forth any of the essential facts constituting the alleged assault.

If the indictment in this case charged appellant with having committed an offense, such charge was that as an aider and abettor he did "on or about September 11, 1965, * * * assault, resist, oppose, impede and interfere with Charles R. Riker."^{4/} The indictment does not identify the place of the alleged assault or state any facts as to the manner in which it was committed or as to how it was aided and abetted by appellant. Was appellant supposed to defend himself against a charge of having advised, incited or connived with Charles Pino to assault Officer Riker on September 11, 1965, or was he to defend himself against a charge of having assisted Charles Pino in the alleged assault? And what did the assault consist of — shooting Officer Riker, or knifing, pushing or verbally abusing him?

The requirement of Rule 7(c) is not a mere technicality to be satisfied by a routine repetition of the language of a criminal statute. The constitutional requirement of an indictment is intended to guarantee that a defendant be sufficiently apprised "of what he must be prepared to meet." Russell v. United States, 369 U. S. 749, 763, 8 L.Ed. 2d 240, 82 S. Ct. 1038 (1962). The Supreme Court

^{4/} Indictment, Count 1

stated in that case (369 U. S. at 765):

"It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species,— it must descend to particulars.' United States v. Cruikshank, 92 U. S. 542, 558, 23 L. Ed. 588, 593. An indictment not framed to apprise the defendant 'with reasonable certainty, of the nature of the accusation against him * * * is defective, although it may follow the language of the statute.' United States v. Simmons, 96 U. S. 360, 362, 24 L. Ed. 819, 820."

Appellant did not object in the District Court to the failure of the indictment to comply with the requirement of Rule 7(c). Such failure was not merely a matter of form; it affected substantial rights of appellant. The failure of the Trial Court to dismiss such indictment constituted plain error which should be noticed on appeal by this Court under Rule 52(b) of the Federal Rules of Criminal Procedure.

III. The Trial Court Erred in Denying Appellant's Motions for Judgment of Acquittal.

With respect to Point 3, appellant desires the Court to read defendant's Exhibits 1 to 7, inclusive (filed as a supplemental record); the following pages of the reporter's transcript: TR 27-33, inclusive; 37; 49-55, inclusive; 64; 68; 71-72; 77; 92; 95-98, inclusive; 107-111, inclusive; 115-116; 120-124, inclusive; 127-130, inclusive; 135-136; 144-145; 148-150, inclusive, 154-159,

inclusive; 170-172, inclusive; 181-182; 185-187, inclusive; 207-208; 210; 213-214; 224; 293-295, inclusive; and Appendix E.

Both at the conclusion of the Government's case and at the conclusion of the taking of evidence, the Trial Court denied appellant's motion for judgment of acquittal (TR 125-27, 228). It is submitted that such denials were erroneous.

Although it is the province of the jury to judge the credibility of the witnesses and to weigh the evidence, that evidence, when viewed in the light most favorable to the Government, must still be sufficient to establish defendant's guilt beyond a reasonable doubt. Stevens v. United States, 115 U. S. App. D.C. 383, 319 F.2d 733 (1963). In this case, the testimony of the Government's witnesses, including that of the two police officers, is so contradictory and confusing, that the evidence falls far short of that standard. Although the Trial Court refused to direct appellants' acquittal, it was obviously troubled by the Government's evidence. The Court stated:

"I agree with you, there are a lot of
inconsistencies. It is not very clear."
(TR 127)

The conviction of a defendant cannot stand, however, unless his guilt is clear beyond a reasonable doubt.

It is apparent that the prosecutor was also troubled by the inconsistent testimony of his witnesses. He presented four witnesses, all of whom were present at the scene of the alleged crime, in support of the Government's charge against appellant and Charles Pino. In his closing argument, however, the prosecutor admitted

confusion on the part of the Government's witnesses and requested the jury only to consider the testimony of the two police officers (TR 238-39).

There was good reason for the prosecutor to cease relying on his other witnesses. One Government witness, Lawrence Schneider, was involved in the fight with appellant on the dance floor (TR 95-96). He was taken out of the restaurant by Officer While (TR 96, 98). When he got outside, he saw Officer Riker and there was fighting going on around him. He saw Officer Riker being hit, but he doesn't know the name of the man who hit him (TR 97).

The other Government witness, Joseph Spivacke, is a member of the police reserve and rooms with three members of the Metropolitan Police Force (TR 110-11). On direct examination, he testified that he saw only one swing and that it was not made by appellant (TR 107). On cross-examination, he admitted that he did not see Officer Riker get hit although he saw hands going towards him and that he doesn't know whose hands they were (TR 108). This Government witness admitted that he was in a daze during the entire fracas (TR 109).

The inconsistencies in the Government's case was not only between the testimony of its police and civilian witnesses. There were inconsistencies in the testimony of the two police officers and between their testimony and the reports which they had filed on the day of the disturbance at the restaurant.

The confusion in the testimony is not difficult to understand in the light of the speed with which the dance floor fight between two individuals developed into a general free-for-all outside of the restaurant. Officer Riker was forced to call for help (TR 49). The arrest book at Precinct 5 shows that six persons, other than appellant and Charles Pino, were arrested in the 500 block of 8th Street, Southeast, between 12:00 A.M. and 1:59 A.M. on September 11, 1965 (Def. Ex. 1). Of the persons booked, only the arrest of Lawrence Schneider, who appeared as a Government witness, was "red-lined" (Def. Ex. 1, TR 49).

Officer Riker testified that he dropped his baton on the way out of the restaurant and that when he bent over to pick it up, appellant pushed him against a stool and ran out of the door (TR 27). Officer While testified that he followed Officer Riker out of the restaurant and did not see him lose his baton or see him pushed by appellant (TR 124). Officer While also testified that when he came out of the door, he first saw appellant and Officer Riker struggling and then saw the latter struck by Charles Pino (TR 122-23). This testimony concerning a struggle is inconsistent with Officer Riker's testimony. The latter made no reference to any struggle with appellant. Officer Riker testified that he was holding and arresting appellant when he was grabbed from behind, that he then turned around and was struck on the jaw (TR 28-29).

In addition to the contradictions between the testimony of the police officers, there were numerous inconsistencies between their testimony at the trial and that contained in the reports which they filed immediately after the alleged assault. For example, in the Statement of Facts which he executed on September 11, Officer Riker made no reference to being pushed against a stool by appellant (Def. Ex. 2, TR 51-52). According to Officer Riker's testimony, this alleged push was the reason for his arrest of appellant outside of the restaurant (TR 28-29, 53-54). In this same report, Officer Riker also stated that he was struck from behind by Charles Pino while on the way to a call box at Eighth and G Streets, Southeast, with appellant. At the trial, however, Officer Riker testified that he was standing outside of the restaurant door at the time of the alleged blow by Charles Pino (TR 28-29). The same report states that both appellant and Charles Pino ran south on Eighth Street after Officer Riker was struck (Def. Ex. 2), but the latter only testified that appellant ran away after the alleged assault (TR 29).

In a more detailed report filed by Officer Riker later in the same day, he stated that he arrested appellant in the restaurant for disorderly conduct (Def. Ex. 4, TR 57). In his testimony, on the other hand, Officer Riker denied arresting appellant inside the restaurant and stated that he made the arrest in front of the establishment (TR 28, 54, 57-58).

Officer Riker also filed an Injury Report on September 11, which did not contain any reference to his being struck by Charles Pino and which stated that he was hit by appellant several times (Def. Ex. 5, TR 91). On the witness stand Officer Riker contradicted this report and testified that Charles Pino hit him first and that appellant thereafter struck him once and ran away (TR 29-30, 92).

Officer While also testified contrary to the Statement of Facts which he filed on the morning of September 11. In that Statement, Officer While reported that the alleged assault on Officer Riker took place while the latter was on the way to the call box at Eighth and G Streets and that both Charles Pino and appellant ran away after the fracas (Def. Ex. 3, TR 120). Officer While's testimony at the trial was that he saw Officer Riker being struck in front of the restaurant and that he did not observe where either appellant went thereafter (TR 115-16, 121). He denied seeing them run away (TR 121).

The report of the Fifth Precinct to the Court of General Sessions, dated September 13, 1965, two days after the melee at the restaurant, charges appellant with having "assaulted officer by hitting him on the left side of face with officer's baton" (Appendix E). This report shows Officer Riker as the arresting officer. The latter testified at the trial, however, that appellant did not strike him with his baton (TR 68).

The evidence presented by the Government bearing upon the alleged assault was not only replete with inconsistencies, it was also in conflict with strong evidence introduced by appellant and Charles Pino. Both admitted their presence at the restaurant and the fact that appellant was taken outside by Officer Riker (TR 148, 158, 167). Both denied striking Officer Riker (TR 151, 167-68).

Appellant testified that when they got outside the restaurant, Officer While struck him with his blackjack (TR 149-50, 156-57). He said that while he was running away he saw Officer Riker chasing another man on the other side of the street (TR 150).

Charles Pino testified that when he arrived outside of the restaurant he stood against the wall and watched a large disturbance which was taking place (TR 168). He then walked away with two other men and when they were told by police officers to clear the street, he got into his car (TR 168) and pulled in front of the restaurant (TR 168). He drove away when an officer told him to move (TR 169). Charles Pino also testified that Officer While struck appellant with his blackjack and that appellant then ran up the street (TR 171-72).

David Green testified that he left the restaurant with Charles Pino and that when they arrived outside there were four or five people around appellant and the two police officers (TR 135). He said that a scuffle occurred and that Officer While took a

swing at appellant who then ran away (TR 135). He did not see appellant strike Officer Riker (TR 136).

Nelson Pumphrey testified that he saw a police officer take appellant out of the restaurant (TR 184). He said that he went outside a little later and saw the police officer trying to break up a fight and that another man walked up and hit the officer on the jaw (TR 186). This man was neither appellant nor Charles Pino (TR 187). The struck police officer was Officer Riker (TR 187).

David Thompson testified that he and a friend were on their way to the restaurant and that when they arrived across the street from it they saw a fight going on (TR 206). He saw appellant come out of the restaurant with a uniformed officer and a man in plain clothes (TR 207). Appellant was then struck by this man and ran away (TR 207, 210, 213-14). Charles Pino was standing against the wall at the time (TR 208). He did not see appellant strike the officer (TR 208). Officer While was a plain clothes officer (TR 33).

It is obvious that the Government's case against appellant is based solely upon the testimony given at the trial by the police officers, particularly Officer Riker. Aside from the inconsistencies in the latter's testimony, its credibility is seriously weakened by evidence revealing that Officer Riker was unable to recognize appellant. Officer Riker admitted that the

first time he had ever seen appellant was in the restaurant on the night of the altercation (TR 32, 64, 224). The record is clear that a huge crowd poured out of the restaurant after appellant and that a number of fights broke out creating general confusion and making identification of any individual difficult (TR 29, 71-72, 97, 140, 168, 172, 208).

Officer Riker admitted that he turned his back on appellant and that his jaw was broken by a blow from another man (TR 29). In this dazed condition, he was hit in the mouth by a second person who he identified as appellant (TR 29).

Six persons in addition to appellant were arrested by Officer Riker and other officers in the early hours of September 11 as a result of the disturbance at the restaurant (Def. Ex. 1). Despite the general confusion, Officer Riker testified that several hours later he was able to identify appellant as his assailant (TR 37). This identification of appellant whom he had seen for the first time a few hours before was made after appellant's face had been badly cut in an automobile accident and while he lay bleeding on a hospital table (TR 37, 77). But appellant's wife and brother testified that when they arrived at the hospital, they were unable to recognize appellant because his face was so swollen, bandaged and caked with blood (TR 144-45, 181-82). Pictures of appellant, taken about two weeks after September 11, indicate rather clearly the severe facial injuries which he had suffered as a result of his automobile accident (Def. Ex. 6, 7, TR 154-55).

Under these circumstances, it is difficult to credit Officer Riker's claim that he recognized appellant at the Hospital. This difficulty is compounded by Officer Riker's subsequent inability to recognize appellant when he made his appearance before the Court of General Sessions. A bondsman, John Everett Light, testified that he was standing in the Courthouse with appellant and another man when Officer Riker walked up to him and asked:

"Which one is Pino?" (TR 128-30)

Mr. Light's testimony was corroborated by appellant (TR 153, 163-65), although it was denied by Officer Riker (TR 223).

In view of the basic inconsistencies in the Government's case and the incredibility of Officer Riker's identification of appellant, it is easy to understand the difficulty which the jury had in arriving at its decision. The jury received the case at 11:50 A.M. on December 16, 1965 (TR 291), but it did not return its verdict until 10:30 A.M. on the following day (TR 298).

But the jury should not have been faced with the problem of determining appellant's guilt or innocence. The Trial Court was accurate in its statement that the Government's evidence contained "a lot of inconsistencies" and was "not very clear." (TR 127). As such, it was not sufficient to establish appellant's guilt beyond a reasonable doubt and the Trial Court was required to acquit him. Campbell v. United States, 117 U. S. App. D.C. 348, 316 F.2d 681 (1963); Cooper v. United States, 94 U. S. App. D.C. 343,

346, 218 F.2d 39, 42 (1954); Scott v. United States, 98 U. S. App. D. C. 105, 232 F.2d 362 (1956).

This Court has stated that even a preponderance of evidence is not enough to meet the standard of proof in a criminal case. Stevens v. United States, supra; Kemp v. United States, 114 U. S. App. D. C. 88, 311 F.2d 774 (1962). But in this case there was no preponderance. The contradictions between the testimony of the police witnesses and between their testimony and that of the Government's civilian witnesses, the inconsistencies between the testimony of the police officers and the reports which they had filed immediately after the disturbance at the restaurant, and the serious doubt as to Officer Riker's identification of appellant as his assailant destroy the foundation upon which the Government's case against appellant rests.

This is true even if the Government is relying solely upon the theory that appellant aided and abetted Charles Pino. This is the offense with which appellant is charged, if he is charged with anything. But the Government made no effort to prove that appellant knowingly connived with Charles Pino to assault Officer Riker or that he knowingly assisted him in such alleged assault. But such guilty knowledge is required for an aider and abettor to be convicted as a principal. Kemp v. United States, supra. As Judge Burger pointed out in his dissenting opinion in Prince Davis v. United States, _____ U. S. App. D. C. _____

(No. 19,596), decided May 16, 1966:

"It is essential that the aider and abettor
share in the criminal intent with the
party who actually commits the offense."

The record is bare of any evidence that appellant shared in a criminal intent that Charles Pino strike Officer Riker. Each and every element of the offense charged has not been established beyond a reasonable doubt. See Hiet v. United States, _____ U. S. App. D. C. _____ (No. 19,716) decided June 22, 1966.

It is submitted that the evidence falls far short of proving appellant's guilt beyond a reasonable doubt and that the Trial Court should have granted his motions for acquittal.

IV. The Prosecutor's Rebuttal Argument Con-
tained Prejudicial Misstatements of Fact
which Deprived Appellant of a Fair Trial.

With respect to Point 4, appellant desires the Court to read the records of the Court of General Sessions set forth in the Appendix A1 to D, inclusive, and the following pages of the reporter's transcript: TR 32, 64, 224, 267-271, inclusive.

In Point 3, supra, we discussed the evidence bearing upon the identification issue in this case. In his rebuttal argument, appellant's counsel stressed the importance of this issue to the jury. He pointed to the fact that Officer Riker had never seen appellant before the night in question and to the evidence challenging Officer Riker's testimony that he recognized appellant in the emergency room of D. C. General Hospital and at the

Court of General Sessions.

Similarly, the prosecutor recognized the importance of the question whether Officer Riker had properly identified appellant as the second man to strike him in the melee outside of the restaurant and he devoted considerable time to it in his rebuttal argument. In so doing, he stated to the jury:

"They admit Louis Pino was there. They admit he was in the custody of Officer Riker, yet the lawyer for Louis Pino will tell you he is mistaken as to identity. How can he be mistaken as to identity when he indicated he had seen Louis Pino before.

It is up to your recollection to govern in that case. He didn't say he knew him, but he said he had seen him before. * * *

They tell you about this identification at the hospital. These officers told you they went to the hospital before this man had any bandages on his face, that is, Louis Pino, and his lawyer tells you about the pictures he presented here taken two weeks afterwards. He failed to bring in any medical reports to show about the terrible conditions of this defendant. I am sure he knows enough about law to get out a subpoena and get some medical records here to show how badly this man was injured. But you haven't seen any.

But you do know from his own testimony that you have him getting out of the elevator over at the General Sessions Court and on Tuesday the 14th, and this happened on the 11th. He was over there going to court notwithstanding all that serious condition. * * * " (TR 267-69).
[Emphasis supplied]

The prosecutor's statement that Officer Riker had seen appellant before was a clear misstatement of fact. Officer Riker

three times stated on the witness stand that he had never seen appellant before the fracas at the restaurant (TR 32, 64, 224).

The prosecutor's comment that Officer Riker was able to recognize appellant at the hospital on September 11 because the latter's appearance in the Court of General Sessions on September 14 showed that his injuries could not have been serious was also inaccurate. The records of the Court of General Sessions, with which the prosecutor was or should have been familiar, flatly contradict this statement. Those records disclose that in his absence, bond for appellant in the amount of \$2,000 was placed by bondsman M. N. Robinson on September 13, 1965 (App. A1). The Court of General Sessions records also contain a "to whom it may concern" statement by a D. C. General Hospital physician, dated September 13, 1965, certifying that appellant was in the hospital at the time "and will be hospitalized for at least the next 14 days" (App. B), as well as a pink card, signed by an assistant United States attorney and dated September 14, 1965, requesting a continuance of the case until October 1, 1965, because "defendant is in hospital" (App. C). These official records of the Court of General Sessions, of which we request this Court to take judicial notice, prove the inaccuracy of the prosecutor's statement. As a matter of fact, the Court of General Sessions records show that appellant did not make the appearance with Bondsman Light, referred to in Point 3, supra, until October 1, 1965 (App. A2, D).

The prosecutor also misled the jury as to the seriousness of appellant's injuries by referring to the failure of his counsel "to bring in any medical reports to show about the terrible conditions of this defendant" (TR 269). D. C. General Hospital is a public institution and if its records concerning appellant were needed to disclose the severity of his injuries, it was the duty of the prosecutor as well as of appellant's counsel to examine the records. These records were not peculiarly within appellant's control so that his failure to produce them permitted comment thereon by the prosecutor. See Johnson v. United States, _____ U. S. App. D. C. _____, 347 F.2d 803 (1965). Moreover, such production was not necessary. Contrary to the prosecutor's statement to the jury, the severity of appellant's injuries was established by the hospital's report of September 13 to the Court of General Sessions (App. B).

In his rebuttal, the prosecutor improperly implied that appellant had a criminal record by stating:

"I was about to say that Mr. Niblack pointed out his man didn't flee the scene like he was a criminal. Well what about Louis Pino." (TR 270)

The erroneous closing remarks of the prosecutor were so highly prejudicial to appellant that they require reversal of his conviction. Corley v. United States, _____ U. S. App. D.C. _____, (No. 19,658) decided June 7, 1966; Reichert v. United States, _____

U. S. App. D. C. _____, 359 F.2d 278 (1966); Jones v. United States, 119 U. S. App. D. C. 213, 338 F.2d 553 (1964).

In Corley this Court reversed the appellant's conviction because of the prosecutor's erroneous account of the alibi testimony by the appellant's witnesses. In pointing out the importance of his alibi to the appellant, the Court stated:

"But for the prosecutor's misstatements, the jury might well have found that the alibi testimony created a reasonable doubt."

In this case, the prosecutor made erroneous statements as to Officer Riker's prior acquaintance with appellant and as to the length of appellant's stay at the hospital. But for these misstatements, the jury might well have believed that the evidence challenging Officer Riker's identification of appellant created a reasonable doubt.

In Jones v. United States, supra, this Court found misstatements by the prosecutor during the trial to be prejudicial even though the Trial Court had instructed the jury to disregard one of the misstatements. Here, no such instruction was given and, in fact, the Trial Court denied appellant's objection to the prosecutor's implication that he had a criminal record and refused his request for an instruction on that subject (TR 270-71).

It is submitted that the misstatements of fact in the

prosecutor's closing argument were highly prejudicial to appellant and deprived him of a fair trial.

CONCLUSION

For the foregoing reasons the judgment of the District Court should be reversed.

Respectfully submitted,

Julius Schlezinger
Counsel for Appellant
Appointed by this Court
1100 - 17th Street, N. W.
Washington, D. C. 20036

APPENDIX

A2

Case No. U.S. 8740-65
 Bond No. B 5827-65
M. N. Robinson, Surety \$1,000
 (Surety)
 Date Cancelled OCT 12 1965

RECOGNIZANCE

DISTRICT OF COLUMBIA
 COURT OF GENERAL SESSIONS
OCT 1 - 1965

Date: _____
 UNITED STATES - DISTRICT OF COLUMBIA

vs. Louis F. Piro
 The defendant and the undersigned surety
 acknowledge themselves to be indebted to the
 UNITED STATES - DISTRICT OF COLUMBIA,
 in the sum of \$ 1,000
 lawful money of the UNITED STATES, to be
 levied on their goods, chattels, lands and
 tenements, upon condition, nevertheless,
 that if the said defendant shall personally
 appear before the Criminal Division of the
 District of Columbia Court of General
 Sessions from day to day at the present
 and any future term thereof, until the said
 cause shall be finally disposed of; and
 answer the charge of

A. P. O.
 against him/her therein preferred, and shall
 not depart the Court without leave, then this
 recognizance to be void and of none effect

Louis F. Piro
M. N. Robinson, Surety
Walter F. Bramhall
 Clerk, District of Columbia
 Court of General Sessions

By: John F. Kue
 Deputy Clerk

10/8

A1

Print Card Bond Reducy
 Case No. U.S. 8740-65
 Bond No. B 5455-65

M. N. Robinson \$2000
 (Surety)
 Date Cancelled OCT 4 - 1965

RECOGNIZANCE

DISTRICT OF COLUMBIA
 COURT OF GENERAL SESSIONS

Date: 9-13-65

UNITED STATES - DISTRICT OF COLUMBIA

vs.

Louis F. Piro
 The defendant and the undersigned surety
 acknowledge themselves to be indebted to the
 UNITED STATES - DISTRICT OF COLUMBIA
 in the sum of \$ 2000
 lawful money of the UNITED STATES, to be
 levied on their goods, chattels, lands and
 tenements, upon condition, nevertheless,
 that if the said defendant shall personally
 appear before the Criminal Division of the
 District of Columbia Court of General
 Sessions from day to day at the present
 and any future term thereof, until the said
 cause shall be finally disposed of, and
 answer the charge of

Asst on Police Officer
 against him/her therein preferred, and shall
 not depart the Court without leave, then this
 recognizance to be void and of none effect.

M. N. Robinson
Walter F. Bramhall
 Clerk, District of Columbia
 Court of General Sessions

By: John F. Kue
 Deputy Clerk

10-1

CLINICAL RECORD

DOCTOR'S PROGRESS NOTES
(Sign all notes)

DATE

D. C. General Hospital
Washington D.C.
9/13/65

TO WHOM IT MAY CONCERN,

This is to certify that Mr Louis PINO
is admitted to this hospital, and will be
hospitalized at least for the next 14 days.

Consequently, it is impossible for the said
Mr PINO to appear in court within the stated
period of 14 days.

John E. Light
J. E. Light
Assistant Surgical Resident

9/14/65

Light talked to U.S. Atty - "Jim Murphy"
who refused to send a pink slip to the
Court in order for this case to be continued
until Oct. 1st, 1965 - The same date as his
brother "Charles Pino";

John E. Light

(Continue on reverse side)

PATIENT'S IDENTIFICATION (For typed or written entries give: Name—last, first,
middle; grade; date; hospital or medical facility)

REGISTER NO.

WARD NO.

C

Form 100

Application for Continuance of Case on
Bond or Collateral

United States
District of Columbia
vs.

Louis F. Pino

Bond \$ 2100, MN Robinson
Surety

Coll. \$..... posted at #..... Precinct

Charge APC/DC

Attorney.....

Officer RIKER # 5

Date 9-14-65

No information has been drawn in the above
case due to

NO INFORMATION
(Reason for Continuance)

Request that case be continued to

Date 10-1-65

[Signature]
Asst. U.S. Atty. /
Asst. Corp. Counsel

Approved:

[Signature]
Judge

Recont'd.....

Disposition.....

CRIMINAL DIVISION

COMPLAINT

No. USH 3478-65

District of Columbia ss:

John R. While has upon oath before me, the undersigned, made complaint and declared that on the 11th day of September, A.D. 19 65, at the District aforesaid, one Louis F. Pino did then and there unlawfully, without justifiable and excusable cause, assault, resist, oppose, impede, intimidate, or interfere with one Charles R. Riker an officer or member of Metropolitan Police Department operating in the District of Columbia, while the said Charles R. Riker was engaged in or on account of the performance of his official duties.

against the form of statute in such case made and provided, and against the peace and Government of the United States of America.

John R. While
Complainant

Subscribed and sworn to before me this 11th day of September, A.D. 19 65.

[Signature]
Judge
District of Columbia Court of General Sessions

WALTER F. BRAMHALL
Clerk, D.C. Court of General Sessions
By [Signature]
Deputy Clerk

WARRANT

To The Chief of Police of the District of Columbia:

WHEREAS the foregoing complaint and affidavit supporting the allegations thereof have been submitted, and there appearing probable cause and reasonable grounds for the issuance of a warrant of arrest for Louis F. Pino YOU ARE THEREFORE COMMANDED TO BRING THE DEFENDANT BEFORE SAID COURT forthwith to answer said charge.

[Signature]
Judge
District of Columbia Court of General Sessions

OFFICER MUST EXECUTE CEPI

Time.

Officer's Name:

Date:

9071-1-1965
J. A. Robinson, Surety 9
Precinct

Precinct

US 8740-65

UNITED STATES

vs.

Louis F. Pino

1614 S St., S. E.

Note Prunus
L. W. Emerson
19-8-55

COMPLAINT

ASSAULT ON A POLICE OFFICER
Title 22 Section 505a D.C. Code

WITNESSES

Pvt. C. R. Riker #5

Pvt. J. R. Whila #5

007 1 1965

Defendant informed of:

1. Within Complaint
2. Right to retain Counsel
3. Right to preliminary Examination
4. Defendant is not required to make statement
5. Any Statement made by Defendant may be used against him

See Inside

606 607

001 1860

Cont'd 10-8-65 Bond \$ 1000.00

None present in Open Court

_____, 19____

Hearing held

Hearing waived

Held to await the action of the

Grand Jury

Bond set in the sum of \$_____

to appear in The United States District

Court for the District of Columbia

P.D. No. 41
9-13-65

Fifth Precinct

METROPOLITAN POLICE DEPARTMENT

Washington, D. C.

To the Clerk Detective Bureau

Sept. 13, 1965

Court.

Sir:

Louis Frank Pino

(Color) White

Age 23

is held

at this station charged with .. Disorderly Conduct and Assault on police Officer
Officer has broken jaw.

Enter complete information so that adequate bond may be set *** : Resisted arrest and
assaulted officer by hitting him on the left side of face with officer's baton

Arresting Officer Charles R. Riker

Pct., Bu. or Div. Fifth

Comm. Off. Fifth

Pct., Bu. or Div.

Issued to M N Robinson

By Benjamin E Grizzard

Date 9-13-65

Released on bond: Date

Time 6:05 PM

9-13-68 Time 6:15

.. 1. If party to be bonded is held as U. S. Witness, state case in which party is U. S. Witness. 2. If case in which party is to be bonded is attachment, enter attachment number after name of defendant.

*** If weapon is used, enter type of weapon, condition of party injured, etc. If Housebreaking, Robbery, Larceny, Embezzlement, etc., enter amount of money or value of property involved.

(To be made in duplicate. Duplicate copy to be completely filled in and filed at Precinct, Bureau or Division)

REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,980

LOUIS PINO

Appellant,

v.

UNITED STATES OF AMERICA

Appellee.

Appeal From Judgment of the United States District
Court for the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED SEP 6 1966

Nathan J. Paulson
CLERK

JULIUS SCHLEZINGER
Counsel for Appellant
Appointed by this Court
1100 - 17th Street, N. W.
Washington, D. C. 20036

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,980

LOUIS PINO

Appellant,

v.

UNITED STATES OF AMERICA

Appellee.

Appeal From Judgment of the United States District
Court for the District of Columbia

REPLY BRIEF FOR APPELLANT

I. The Trial Court Lacked Jurisdiction
to Try and Convict Appellant

Appellee contends that any challenges to the indictment are inappropriate on appeal because neither appellant presented any objections to it prior to trial and neither requested a bill of particulars. Relying upon Rule 12b(2) of the Federal Rules of Criminal procedure, appellee takes the position that appellant waived any objection to the indictment by not raising such

objection by motion before trial. Appellee cites Hagner v. United States, 285 U. S. 427, 76 L. ed. 861 (1932), for the proposition that an appellant may not wait until appeal to attack his indictment, "for mere technicalities and a strained interpretation of its language."

Appellee appears to have misconstrued appellant's principal challenge to the indictment and it has failed to answer such challenge. We are not raising mere technical objections to the indictment. Our basic contention is that the indictment, after the dismissal of Count 2, did not charge appellant with the commission of a crime and that the Trial Court lacked jurisdiction to try and convict him.

Rule 12b(2) specifically provides that "lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the Court at anytime during the pendency of the proceeding." The requirement of the Fifth Amendment that "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury" cannot be waived and no court has authority to try a defendant without compliance with such requirement. Ex Parte Bain, 121 U. S. 1, 30 L.ed. 849, 7 S. Ct. 781 (1886); Crosby v. United States, 119 U.S. App. D. C. 244, 339 F.2d 743 (1964).

In Hagner, the petitioners were convicted of having used the mails to defraud by means of a letter mailed from Scranton, Pennsylvania, to an addressee in the District of Columbia. Petitioners contended that the indictment was defective in that it failed to allege delivery of the letter. The Supreme Court, in rejecting this contention, pointed to the presumption that a properly directed letter reaches its destination and is actually received by the person to whom it was addressed. Accordingly, the Supreme Court held that the indictment did charge an offense in the District of Columbia and that any defect in the indictment was a matter of form only which had not prejudiced the petitioners. Hagner in no way supports the proposition that a defendant can be tried and convicted upon an indictment which does not charge him with a criminal offense.

Similarly, Cratty v. United States, 82 U. S. App. D. C. 236, 163 F.2d 844 (1947), relied upon by appellee, has no relevance to the issue in this case. There was no contention in Cratty that the indictment failed to charge appellant with violation of the Marijuana Tax Act which was there involved. The attack was upon the form of the indictment, i.e., that three of the counts in it charged that the transfer of marijuana was at once both legal and illegal. This Court held

that although the contentions were redundant, they were not self-conflicting as asserted and not fundamentally defective, since they adequately informed each appellant that he was charged with a violation of the Act. In sustaining the conviction, the Court pointed out that the attack on the indictment was too late as "it is not an attack upon the jurisdiction of the court and does not assert that the indictment fails to state a public offense." 163 F.2d, at 849.

Appellee argues that appellant waived any possible objection to the first count, by first contending that the two counts were redundant and then, after the dropping of the second count upon such ground, failing to object until appeal. As authority for this position, appellee cites only United States v. Visconti, 261 F.2d 215 (CA2-1958), cert. denied, 359 U. S. 954 (1958). Visconti was an application for a writ of habeas corpus urging a number of points, including a contention that the indictment upon which the prisoner was convicted had been fraudulently obtained. In denying the appeal from a dismissal of his application, the Court held that this contention was frivolous. Clearly, Visconti has no relevance to an appeal from a conviction on the ground of lack of jurisdiction in the Trial Court.

The basic defect in the indictment upon which appellant was tried was recognized by the Trial Court and it is still recognized by the prosecution. The Court below stated that both appellants "should have been charged as principals." (Tr. 21-23). In its brief in this Court, appellee regrets the Action taken by the Trial Court in dismissing Count 2 and frankly states that "If anything had to be stricken, it would have been better to strike the two clauses referring to aiding and abetting as surplusage pursuant to Rule 7(d), F. R. Crim. P. This would have left each of the brothers charged as principals in separate counts."

Appellant agrees that only the second count, which was dismissed by the Trial Court, charged him as a principal. As appellee concedes, the reference to appellant in the first count was mere surplusage. But the statute requires that persons "aiding or abetting the principal offender, shall be charged as principals and not as accessories * * *." 22 D. C. Code §105. Count 1 charged only Charles Pino with having assaulted Officer Riker; it alleged no offense by appellant. Cf. United States ex rel Miller v. Walsh, 90 F. Supp. 332, 338 (N.D. Ill., 1949), aff'd 182 F.2d 264.

II. The Trial Court Erred in Not Dismissing the Indictment for Failure to Allege Intent and in Failing to Instruct the Jury with Respect to Intent.

Citing United States v. Bachman, 164 F. Supp. 898 (D.C.D.C. 1958), appellee argues that "paraphrasing of the

statute is permissible in ordinary situations unless some element of the crime is missing in the statute." Bachman, involved a motion to dismiss an indictment charging defendants with having conspired to violate the National Firearms Act and the Federal Firearms Act. One of the grounds of the motion was that the indictment was vague and indefinite, because it pleaded mere legal conclusions without supporting allegations of essential facts. In denying the motion, Judge Tamm pointed out that the indictment, in addition to charging the offenses in the statutory language, revealed the means by which the conspiracy was to be carried out and detailed the actions of the defendants which violated the statutes. (164 F. Supp. at 903).

Unlike Bachman, the indictment in this case merely repeated the generic words of the statute and it furnished no details whatsoever concerning the means by which the alleged assault was carried out. It failed to state the essential particulars of the alleged offense. Russell v. United States, 369 U. S. 749, 765, 8 L.ed. 2nd 240, 82 S. Ct. 1038 (1962).

Moreover, unlike Bachman, an essential element of the alleged crime was omitted from this indictment. Counsel for appellant Charles Pino pointed out in his main brief that intent is an essential element of a criminal assault and that neither the statute nor the indictment in this case charge appellants with intent to commit an assault. In response,

appellee cites Parker v. United States, _____ U. S. App. _____, 359 F.2d 1009 (1966), for the proposition that assault is a "general intent crime" for which no averment is necessary in the indictment.

Parker was an appeal from a conviction for an assault with a dangerous weapon in violation of 22 D. C. Code §502. The appellant in that case contended that as he had committed the assault while intoxicated he had not possessed any intent to inflict injury. In sustaining the conviction, this Court held that assault with a dangerous weapon does not require a specific intent to commit a particular crime. The Court pointed out that unlike the other crimes with which it is grouped, assault with a dangerous weapon is dangerous because of the nature of the instrumentality used without regard to whether there was any intention to inflict injury through the use of such weapon (359 F.2d, at 1013).

The holding in Parker that specific intent is not required for an assault with a dangerous weapon may be applicable to alleged violations of 22 D. C. Code §505(b), which prohibits the use of a deadly or dangerous weapon in assaults upon police officers. It has no applicability, however, to alleged violations of 22 D. C. Code §505(a), which simply forbids assaults upon such officers. Such assaults are akin

to common law assaults and require a specific intent to inflict injury on the person assaulted.

The defect in the subject indictment was compounded by the failure of the Trial Court to instruct the jury that intent was an essential element of the alleged crime. As in Jackson v. United States, 121 U. S. App. D. C. 160, 348 F.2d 772 (1965), where the trial court had failed to instruct the jury that the crime of robbery required a specific intent to deprive the victim of her property, the failure here constituted plain error under Rule 52(b) of the Federal Rules of Criminal Procedure. This is particularly true with respect to appellant whose alleged crime, if he was charged with any offense, was that of aiding and abetting Charles Pino in an assault upon Officer Riker. Yet in explaining the meaning of "aiding and abetting" to the jury, the Trial Court failed to state that appellant could be found guilty only if he had had knowledge of Charles Pino's alleged intention to assault Officer Riker or that he had shared in the former's intention to do so. Prince Davis v. United States, _____ U. S. App. D.C. _____, (No. 19,596), decided May 16, 1966.

III. The Trial Court Erred in Denying
Appellant's Motion for Judgment
of Acquittal.

In contending that the evidence was sufficient to permit the case to go to the jury appellee, citing Thompson v.

United States, 88 U. S. App. D. C. 235, 188 F.2d 652 (1951), argues that Officer Riker's testimony standing alone constituted sufficient evidence and, in any event, his testimony was corroborated by Officer While and by a non-police bystander.

Irrespective of whether Officer Riker's testimony standing by itself would have justified denial of appellant's motion for judgment of acquittal, it did not stand alone in this case. In addition to Officer Riker's testimony, the Government offered the testimony of two civilian witnesses which was so inconsistent with that of Officer Riker that the prosecutor informed the jury that he was not relying upon them (Tr. 239, 267).

Appellee supports its assertion of corroboration by a non-police witness by transcript references to the testimony of Joseph L. Spivacke. Prosecution witness Spivacke, a member of the police reserve, testified that he saw only one swing and that it was not made by appellant (Tr. 107), that he did not see Officer Riker get hit (Tr. 108), and that he was in a daze during the entire fracas (Tr. 109). With respect to his testimony the prosecutor stated:

"We are not relying on him." (Tr. 239).

Appellee's Counterstatement of the Case is also erroneous in its reference to the testimony of Government

witness Schneider. Appellee states that Schneider saw the charged assault, including the alleged striking of Officer Riker by both appellants. This statement is flatly contradicted by the record. Government witness Schneider, who had been in a fight with appellant on the dance floor only a few minutes before, testified that he saw Officer Riker get hit in front of the restaurant but that he did not know the name of the man who hit him (Tr. 97). The prosecutor was well advised to inform the jury that he was not relying on the testimony of the non-police witnesses.

In our main brief, we set forth in considerable detail the inconsistencies between the testimony of the Government's police and civilian witnesses and between their testimony and the reports which they had filed immediately after the fracas at the restaurant. That testimony was so confusing that the Trial Court agreed that "It is not very clear." (Tr. 127). Inconsistent testimony which is not very clear does not prove guilt beyond a reasonable doubt and it is not sufficient to permit a case to be submitted to the jury.

IV. The Prosecutor's Closing Argument Deprived Appellant of a Fair Trial

Appellee admits that the prosecutor's closing statement that Officer Riker had seen appellant before the restaurant fracas was a clear misstatement of fact. He contends, however,

that the misstatement was corrected by defense counsel and was nonprejudicial.

In his summation, defense counsel did attempt to correct the misstatement. But any remedial effect which his correction might have had was promptly dissolved by the prosecutor's emphatic repetition in his rebuttal argument of the false statement that Officer Riker had previously seen appellant. The prosecutor said:

"They admit Louis Pino was there. They admit he was in the custody of Officer Riker, yet the lawyer for Louis Pino will tell you he is mistaken as to identity. How can he be mistaken as to identity when he indicated he had seen Louis Pino before.

It is up to your recollection to govern in that case. He didn't say he knew him, but he said he had seen him before."
(Tr. 267)

Contrary to appellee's assertion, this misstatement of fact was extremely prejudicial to appellant. Although appellant was escorted out of the restaurant by Officer Riker, there was sharply conflicting testimony before the jury as to whether he was the person who had subsequently struck the latter. As appellee states, a regular donnybrook developed outside the restaurant. A huge crowd poured out of the restaurant after appellant and general fighting began

which did not end until the arrival of police reinforcements and the arrest of a number of individuals. (Tr. 29, 71-72, 97, 140, 168, 172, 208, Def. Ex. 1). Officer Riker's testimony indicates that he was turned away from appellant when the latter allegedly struck him. (Tr. 29). In view of the fact that he was already dazed from a preceding blow on the jaw and the confusion existing at the time, the jury might well have doubted his identification of appellant as his second assailant had it not been for the prosecutor's repetition of his erroneous claim that Officer Riker had previously seen appellant.

Adding to the prejudicial character of the prosecutor's summation was his insistence that appellant had been in the Court of General Sessions on September 14, 1965, thus buttressing the prosecutor's contention that appellant could not have been seriously injured as a result of the automobile accident. It is true that no evidence was introduced contradicting the bondsman's testimony that September 14 was the date on which Officer Riker had been unable to recognize appellant in the hallway of the Court of General Sessions. But the prosecutor should have known that a fellow Assistant United States Attorney had on September 14 requested a continuance of the

preliminary hearing in appellant's case because "defendant is in hospital."

If Officer Riker recognized appellant as his assailant, the question whether he could identify him either at the hospital or the Court of General Sessions might have little bearing on this case. In view of the sharply conflicting evidence as to whether appellant struck Officer Riker, however, the accuracy of the latter's identification of him as the assailant was an important issue in the case. The weight accorded by the jury to that identification was undoubtedly affected by Officer Riker's testimony that he had recognized appellant at the hospital and the Court of General Sessions. The prosecutor's disparagement of appellant's injuries by his inaccurate reference to a September 14 appearance at the Court of General Sessions may well have influenced the jury to accept the Riker identification.

CONCLUSION

For the foregoing reasons and those set forth in our main brief, the judgment of the District Court should be reversed.

Respectfully submitted,

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APPELLANT'S PETITION FOR REHEARING EN BANC

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 16 1966

Nathan J. Paulson
CLERK

No. 19,980

LOUIS PINO

Appellant

v.

UNITED STATES OF AMERICA

Appellee

Appeal from Judgment of the United States District
Court for the District of Columbia

Julius Schlezinger
Counsel for Appellant
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1100 - 17th Street, N. W.
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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,980

LOUIS PINO

Appellant,

v.

UNITED STATES OF AMERICA

Appellee.

Appeal from Judgment of the United States District
Court for the District of Columbia

APPELLANT'S PETITION FOR REHEARING EN BANC

Appellant, Louis Pino, petitions this Court for rehearing en banc on the jurisdictional question whether the indictment upon which he was tried charged him with the commission of a crime. In support of this petition appellant states:

The indictment returned by the Grand Jury in this case contained two counts. Count One charged:

"On or about September 11, 1965, within the District of Columbia, Charles Pino, aided and abetted by Louis Pino, without

justifiable and excusable cause, did assault, resist, oppose, impede, intimidate and interfere with Charles R. Riker, knowing him to be a member of the Metropolitan Police Department, operating in the District of Columbia, while the said Charles R. Riker was engaged in the performance of his official duties."

Count Two charged:

"On or about September 11, 1965, within the District of Columbia, Louis Pino, aided and abetted by Charles Pino, * * * did assault * * * Charles R. Riker * * *."

After the swearing in of the jury at the opening of the trial the Court dismissed the second count, leaving only Count One at issue. It is appellant's contention that in this count the Grand Jury had charged only Charles Pino with an assault upon Officer Riker and that it had not alleged any offense by appellant, Louis Pino.

There is no question, of course, that in Count Two the Grand Jury did charge Louis Pino with an assault upon Officer Riker. Louis Pino was not tried upon that charge, however; he was tried instead upon an indictment which charged only Charles Pino with the commission of a crime. If, as we believe, Count One did not contain any charge against Louis Pino, the Court was without jurisdiction to try him. The Court cannot retroactively acquire jurisdiction by reading into Count One the charge which it had dismissed in Count Two.

Although not conceding lack of jurisdiction, the Government appears to recognize that Count One did not charge Louis Pino with the commission of a crime. Its brief states:^{1/}

"It is regrettable that any action was taken by the trial court with regard to the original indictment, which clearly charged each appellant as a principal and apprised each that he might face a Government case based upon an aiding and abetting theory. If anything had to be stricken, it would have been better to strike the two clauses referring to aiding and abetting as surplusage pursuant to Rule 7(d), F. R. Crim.P. This would have left each of the brothers charged as principals in separate counts."

From the Government's viewpoint, it may well be regrettable that the trial court struck the count in the indictment which charged Louis Pino with the commission of a crime.^{2/} And we agree with the Government that the aiding and abetting clause in Count One is "surplusage." We do not

^{1/}Brief for Appellee, p.8

^{2/}22 D. C. Code §105 requires that "in prosecutions for any criminal offense all persons * * * aiding or abetting the principal offender, shall be charged as principals and not as accessories * * *."

agree, however, that the Constitution permits a defendant to be tried and convicted upon a superfluous clause in an indictment rather than upon the charge presented by the Grand Jury.

In its per curiam opinion in this case the Court recognized the problem presented by the language of the indictment, but concluded that reversal is not compelled for appellant Louis Pino. Referring to our contention that only Charles Pino is charged with a crime in Count One, the Court stated:

"Any substance this claim may have is to be found in the niceties of grammar and syntax, and not in the objects and purposes of indictments, which in essence are to apprise a person of the wrong for which he is to be tried and thereby to enable him to defend against it. Although technicalities are, and rightly so, less alien to the law of indictments than elsewhere, we do not believe they require a reading of the first count of this indictment which would destroy the court's jurisdiction."

Appellant submits that the issue which he is raising concerning the language of the indictment is not one "found in the niceties of grammar and syntax," but goes to the very heart of the Court's jurisdiction. The Constitution guarantees that "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment of a Grand Jury."^{3/}

^{3/} Amendments to the Constitution of the United States, Article V.

If the language used by the Grand Jury in Count One does not charge him with a crime, the omission is substantive and not a technicality.

The only reference to Louis Pino in the indictment upon which he was tried is contained in the subordinate "aided and abetted" clause, termed "surplusage" by the Government. It may be a question of "grammar and syntax" whether this clause which helps describe the method by which Charles Pino carried out the alleged assault on Officer Riker, constitutes a participial phrase or some other form of grammatical construction. Clearly, however, the clause is not the object of the Grand Jury's charge.

The Government's position appears to be that the Trial Court, having obtained jurisdiction over Louis Pino by virtue of Count Two of the indictment, retained such jurisdiction even after that charge was dismissed. It is well settled, however, that the constitutional guarantee of trial only upon a presentment of a Grand Jury extends to every step of the criminal proceeding and not merely to the opening of the trial. In Ex Parte Bain, 121 U.S. 1, 13, 30 L. Ed. 849, 7 S.Ct. 781 (1887), where, as here, language of the original indictment had been stricken by the trial court, the Supreme Court held:

"The decisions which we have already referred to, as well as sound principle, require us to hold that after the indictment was changed it was no longer the

indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for, if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the Constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists. It is of no avail, under such circumstances, to say that the court still has jurisdiction of the person and of the crime; for, though it has possession of the person, and would have jurisdiction of the crime, if it were properly presented by indictment, the jurisdiction of the offense is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment. If there is nothing before the court which the prisoner, in the language of the Constitution, can be 'held to answer,' he is then entitled to be discharged so far as the offense originally presented to the court by the indictment is concerned. The power of the court to proceed to try the prisoner is as much arrested as if the indictment had been dismissed or a nolle prosequi had been entered. There was nothing before the court on which it could hear evidence or pronounce sentence."

The rule prohibiting trial upon a charge not presented by the Grand Jury has never been deviated from in the eighty years which have elapsed since its pronouncement in Ex Parte

Bain. In Stirone v. United States, 361 U.S. 212, 4 L. Ed. 2d 252, 80 S.Ct. 270 (1960), the Supreme Court reversed a conviction for unlawfully interfering with interstate commerce in violation of the Hobbs Act^{4/} because the District Court had permitted the introduction of evidence and charged the jury with respect to shipments of concrete from the concrete plant to its customer, although the indictment had only charged interference with shipments of supplies and materials to the concrete plant. In so doing, the Court discussed the Bain case and stated (361 U.S. at 216):

"If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer,' may be frittered away until its value is almost destroyed.' 121 U.S. 1, 10."

As in Stirone, the Court in this case read into Count One a charge against Louis Pino not presented there by the Grand Jury. But it was beyond the power of the Court to remedy the deficiency in the indictment by retroactively reading into

^{4/}62 Stat 793, 18 USC §1951.

it a charge which it had dismissed. Cf. dissenting opinion of Mr. Justice Stewart, United States v. Fabrizio, _____ U.S. _____ (No. 47), decided December 12, 1966, 35 Law Week 4079, 4082.

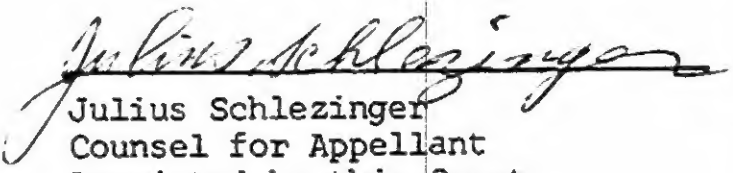
The Court's conclusion that Count One includes a charge against Louis Pino appears to be based at least in part upon the fact that the dismissal of Count Two may have resulted from a suggestion by his trial counsel that the two counts were redundant. If there was redundancy, it could not be cured by first dismissing the charge against Louis Pino and then trying him upon the Grand Jury's charge against his co-defendant. The Constitutional guarantee of trial only upon charges presented by a Grand Jury cannot be waived. Ex Parte Bain, supra; Crosby v. United States, 119 U.S. App. D. C. 244, 339 F.2d 743 (1964). In Crosby, the defendant's counsel had failed to object to a dangerous-weapon charge where the indictment had charged robbery. In reversing the conviction for assault with a dangerous weapon, this Court stated:

"The Government relies primarily on appellant's failure to object to the dangerous-weapon charge; and without doubt this contributed substantially to the District Court's action. The Government asserts, in effect, that appellant has waived his right to be charged by a grand jury for the precise offense of which he was convicted. We

cannot agree. The scope of the indictment goes to the existence of the trial court's subject-matter jurisdiction. * * * To hold otherwise would in effect be to allow judicial amendment of the grand jury's indictment; this cannot be accomplished even with a defendant's consent. The Supreme Court has ruled that the Fifth Amendment's guarantee may not be so undermined. Stirone v. United States, supra; Ex Parte Bain, supra. Accordingly, we reverse appellant's conviction."

It is submitted that the count of the indictment upon which Louis Pino was tried and convicted does not charge him with the commission of a crime. The Court has asserted jurisdiction by retroactively reading into it a charge not presented in such count by the Grand Jury. Such judicial amendment of the indictment is beyond the power of the Court. The issue here presented is important to the administration of justice in the District of Columbia. We urge its consideration by the Court en banc.

Respectfully submitted


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1. The first question is whether the defendant is a citizen of the United States. The answer is yes. The defendant is a citizen of the United States.

[illegible]

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

CERTIFICATE OF COUNSEL

I, Julius Schlezinger, counsel for appellant, certify that this petition for rehearing en banc is presented in good faith and not for delay.


Julius Schlezinger